(3)

Single Bench

CP 501

IN THE HIGH COURT OF JUDICATURE AT
BILASPUR, CHHATTISGARH

SECOND APPEAL No. 141 OF 2004

APPELLANTS
DEFENDANTS

1. Gambhir, aged about 75 years
S/o Sampat Sahu

2. Amanlal, aged about 45 years,
S/o Gambhir Sahu

Both residents of Village Kopra,
Tehsil Rajim, District Raipur
(Chhattisgarh)

Versus

RESPONDENTS

1. Onkar Singh, aged about 40
years, S/o Gajanand Singh,
resident of Village Kopra, Tehsil
Rajim, District Raipur
(Chhattisgarh)

2. State of Chhattisgarh, through
the Collector, District Raipur
(Chhattisgarh)

P. R. No. 619/04
Presented by Shri Sameer Behra
dated 6/2/04

MEMO OF SECOND APPEAL UNDER SECTION 100 C.P.C.

APR

HIGH COURT OF CHHATTISGARH AT BILASPUR

SECOND APPEAL NO. 141 OF 2004

Gambhir & Another

Vs.

Onkar Singh & Another

J U D G M E N T

Post for 13 **/12/2004**

Sd/-
Sunil Kumar Sinha
Judge

10/12/2004

Seen
13/12/2004
(Counsel for appellants)

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HIGH COURT OF CHHATTISGARH AT BILASPUR

SECOND APPEAL NO. 141 OF 2004

Gambhir & Another

Vs.

Onkar Singh & Another

Shri Hari Shankar Patel, Counsel for the appellants.

As per Sunil Kumar Sinha, J

J U D G M E N T
(Dated 13/December, 2004)

Heard on the question of admission.

2. This appeal has been filed by the defendants under section 100 of the Code of Civil Procedure against the judgment and decree dated 13-1-2004 passed in civil appeal No.2-A/2002 by the District Judge, Raipur arising out of judgment and decree dated 7-1-2002 passed in civil suit No.69-A/98 by the Civil Judge Class-I, Gariaband, District Raipur.

3. The brief facts of the case are that the original plaintiff namely Smt. Chudimanidevi, widow of Late Shri Loom Singh Khestri initially filed a suit for permanent injunction and damages in relation to the suit lands bearing Khasra Nos. 2060/1 and 2061/4 area 3 decimal

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(0.012 hectare) situated in village Kopra, P.C.No.15, Tehsil Rajim, District Raipur. The plaint allegations are that the suit lands were properties of the ownership and possession of the plaintiff alone. These are more specifically shown by the red ink mark in the map annexed to the plaint. On the date of cause of action, the defendants forcefully entered into the suit lands and started raising some construction. On resistance, when the construction was not stopped, proceedings before Tahsildar were filed by the plaintiff and an order dated 1-3-1993 was passed by Tahsildar restraining the defendants from raising any construction. When the defendants did not stop the work, then only the plaintiff was constrained to file the civil suit for the aforesaid reliefs.

4. Defendants No. 1 and 2 filed their written statement denying the contentions of the plaintiff. It was pleaded by them that in fact they had purchased Khasra Nos. 2059, 2060 and 2061 from the plaintiff on 26-7-1965 for a consideration of Rs.2,825/-. They are in continuous possession of the said properties since 26-7-1965, therefore, question of any illegal possession does not arise.

5. In the alternative, the defendants also raised a plea that since they are in continuous possession from a very

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long period i.e. from 26-7-1965, they have also perfected their title by way of adverse possession.

6. During the pendency of the suit, the plaintiff amended the plaint for possession as well pleading that the defendants have forcefully raised construction over the suit property and vacant possession of the same is required to be given to her after removing the superstructure.

7. The original plaintiff namely Smt. Chudimanidevi died on 16-12-1994, during pendency of the suit and her legal representative namely Onkar Singh was substituted on record on the strength of a will by the order of the trial Court dated 9-8-1995. Though, an objection in relation to the genuineness of the said will was raised by the defendants, but the same was overruled and the learned trial Judge directed for substitution on the basis that the will is a registered document and except the applicant nobody has claimed to be the successor of the plaintiff. It was also mentioned in the said order that the question of validity of the will may be decided on its own merits when the occasion arises.

8. Even after all these, the defendants did not raise any plea regarding the genuineness of the will in their written statement and no specific issues were framed in this regard.

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9. The learned trial Judge framed various issues and almost all the issues were decided in favour of the plaintiff. It was held that defendants No. 1 and 2 have encroached upon the suit land and the suit land is not the part and parcel of the property purchased by them from the original plaintiff by way of sale deed dated 26-7-1965. It was also held that the defendants have not perfected their title by way of adverse possession. However, the learned trial Court vide para 32 of the judgment held that nobody can be substituted as a legal representative of the deceased in the suit on the strength of will. It was further held that the suit has abated on the date of death of the plaintiff. It was also held that in fact, by mistake, the Court passed an order for substitution on 9-8-1995, on the strength of will and therefore only, the suit was liable to be dismissed and the same was ultimately dismissed holding that the substituted plaintiff namely Onkar Singh was neither the owner of the suit lands nor was the successor of the original plaintiff, hence, a decree for possession and permanent injunction cannot be passed in his favour.

10. Against the aforesaid judgment and decree passed by the trial Court, substituted plaintiff namely Onkar Singh, filed an appeal before the lower appellate Court and the said Court allowed his appeal and set aside the judgment

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and decree of the trial Court. It was held by the lower appellate Court that since by order dated 9-8-1995, valid substitution of the plaintiff had taken place under Order 22 Rule 3 of the Code of Civil Procedure, on the strength of the will, and subsequently the will was not at all challenged by the defendants by taking a plea in their written statement, therefore, this question was not open for consideration before the trial Court even without framing any issue in this regard and without giving any opportunity of being heard to the parties. The finding in this regard, was set aside by the lower appellate Court and ultimately it was held that the suit before the trial Court has not abated on the death of the original plaintiff and a valid substitution had taken place and after the said substitution, the substituted plaintiff was entitled for the reliefs claimed in the suit.

11. After perusal of the record of the lower appellate Court, it appears that the defendants had not filed any counter appeal against the adverse finding recorded by the trial Court in relation to encroachment and adverse possession and ultimately the findings recorded against the issues regarding the encroachment and adverse possession became final.

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12. Now in the second appeal, learned counsel for the appellants/defendants submits that the Courts below have erred in law in holding that the defendants had encroached upon any portion of the suit land and decree for possession has been wrongly passed in favour of the plaintiff. It is also argued that the defendants have acquired their title by way of adverse possession as they are possessing the suit lands since the year 1965.

13. I have heard learned counsel for the appellants at length and have perused the records. It is an important feature of the case that against the findings recorded by the trial Court vide issue Nos. 1, 2, 3 and 4 which are the issues in relation to the encroachment as well as adverse possession, no appeal was preferred by the defendants. Now the defendants are trying to make out a case in this second appeal by raising the plea of perversity in the findings of encroachment as well as adverse possession.

14. I have also gone through the evidence and perused the judgments passed by the two Courts below. In fact, it transpires from the last lines of para 19 of the trial Court's judgment that the factum of encroachment was established on the basis of Commissioner's report in which it was held that the defendants have encroached upon a portion of 0.012 hectares of the suit lands belonging to the plaintiff.

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Not only this, the factum of adverse possession has also been properly dealt with and a right finding has been recorded that the defendants have not perfected their title by way of adverse possession. I do not find any infirmity in the aforesaid findings recorded by the trial Court against which no appeal was preferred by the defendants, hence, the said findings are binding and are not disturbed by this Court.

15. This is an important consideration that now this Court is dealing with the matter in a second appeal for which the Hon'ble Apex Court has held that under Section 100 of the Code of Civil Procedure the jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with the pure questions of fact while exercising its jurisdiction under Section 100 of the Code of Civil Procedure (*please see* ***Roop Singh (Dead) through LRs Vs. Ram Singh (Dead) through LRs*** *reported in* ***(2000) 3 SCC 708***). It is also to be noted that the existence of substantial question of law is the *sine qua non* for the exercise of jurisdiction under the amended provisions of Section 100 of the Code of Civil Procedure and unless such questions are involved, the appeals are not to be entertained (*please see* ***Thiagarajan and Others Vs. Sri***

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Venugopalaswamy B. Koil and Others *reported in* ***(2004) 5 SCC 762***).

16. Having considered the facts and circumstances of the case, material on record and in view of the aforesaid decisions of Hon'ble Apex Court, in the opinion of this Court, no substantial questions of law are involved warranting interference under Section 100 of the Code of Civil Procedure, hence, the appeal fails and the same is dismissed at the admission stage itself. No orders as to the costs.

Sd/-
Sunil Kumar Sinha
Judge

13/12/2004

Gowri

19/12-04